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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

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FILE:

[REDACTED]

Office: TEXAS SERVICE CENTER

Date:

JUL 20 2005

SRC 04 048 51301

IN RE:

Petitioner:
Beneficiary

[REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann

& Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner filed Form I-140, Immigrant Petition for Alien Worker, and checked box "h" on the form, thereby indicating that the petitioner seeks to classify the beneficiary as an alien of exceptional ability or a member of the professions holding an advanced degree, and that the petitioner seeks an exemption from the requirement of a job offer, and thus of a labor certification, in the national interest of the United States. Counsel's cover letter, filed with the petition, begins with the heading "I-140 Petition for Alien Worker under National Interest Waiver."

Everything else the petitioner has submitted, however, has related to an entirely different immigrant classification. The same introductory letter from counsel, quoted above, indicates that the beneficiary "has worked for the USAF under Foreign Military Sales contract." A separate statement, with no signature or attribution, states:

The Employment Based Fourth Preference (EB4)
Employer required and Labor Certification not required

This preference is for "special immigrants" which is explained in the following paragraph:

Immigrants in this category include religious ministers, certain long-time employees of the U.S. government (or of certain international organization[s]) employed abroad, and some physicians who have resided in the U.S. for a number of years, court dependants [sic], etc.

In a letter accompanying the petition, the beneficiary states that he is "Seeking National Interest Waiver under section 42.32(d) N6.5-3 'Exceptional Circumstances.'"

The so-called "EB4" classification, pertaining to special immigrants such as those listed above, is an entirely different classification than the exceptional ability/advanced degree classification requested on Form I-140. The classifications are governed by separate sections of law, sections 203(b)(4) and 203(b)(2), respectively. The national interest waiver applies only to the exceptional ability/advanced degree classification.

In response to a request for additional evidence, the beneficiary stated that he "applied for National Interest Waiver, under preference EB4."

The director denied the petition, stating that the petitioner has not shown that the beneficiary meets the eligibility requirements set forth in regulations at 8 C.F.R. § 204.5(k) and its incorporated subsections, which govern the classification that the petitioner requested by checking box "h" on Form I-140. The director also indicated that the petitioner has submitted nothing to meet the guidelines set forth in *Matter of New York State Dept. of Transportation*, 22 I&N Dec. 215 (Comm. 1998), a precedent decision that relates to the national interest waiver of the job offer requirement.

On appeal, counsel states that the director failed to take into account materials submitted in response to a request for evidence. Counsel does not address the basic statutory and regulatory requirements that the director listed in the denial notice.

It is clear that the petitioner has confused different classifications, attempting to combine the national interest waiver with a classification to which the waiver does not apply. The preponderance of the materials in the record

indicate that the petitioner seeks to classify the beneficiary not as an alien of exceptional ability or a member of the professions holding an advanced degree, pursuant to section 203(b)(2) of the Act, but as a special immigrant, pursuant to sections 203(b)(4) and 101(a)(27) of the Act.

Section 101(a)(27)(D) of the Act states, in full, that the definition of "special immigrant" includes:

an immigrant who is an employee, or an honorably retired former employee, of the United States Government abroad, or of the American Institute in Taiwan, and who has performed faithful service for a total of fifteen years, or more, and his accompanying spouse and children: Provided, That the principal officer of a Foreign Service establishment (or, in the case of the American Institute in Taiwan, the Director thereof), in his discretion, shall have recommended the granting of special immigrant status to such alien in exceptional circumstances and the Secretary of State approves such recommendation and finds that it is in the national interest to grant such status.

Form I-140 cannot be used to petition for any special immigrant classification. Some types of special immigrant classification can be requested on Form I-360, Petition for Amerasian, Widow(er) or Special Immigrant. In this instance, however, the petitioner seeks to classify the beneficiary under a classification for which jurisdiction lies not with Citizenship and Immigration Services (CIS), but with the Department of State (DOS).

We note the beneficiary's reference to "section 42.32(d) N6.5-3." This is not a CIS regulation, but a partial citation from the DOS' Foreign Affairs Manual (FAM). 9 FAM 42.32(d)(2)(1)(A) states, in pertinent part:

An alien is classifiable under INA 203(b)(4) as a special immigrant described in INA 101(a)(27)(D) if a petition to accord such status has been approved by the Secretary of State. An alien may file such a petition only after, but within one year of, notification from the Department that the Secretary of State has approved a recommendation from the Principal Officer that special immigrant status be accorded the alien in exceptional circumstances and has found it in the national interest so to do.

The above citation indicates that, for the type of special immigrant status sought in this matter, the petition must be filed with DOS, rather than with CIS. The passage at 9 FAM 42.32(d) N6.5-3, cited by the beneficiary in his letter, discusses the nature of the "exceptional circumstances" to be taken into account.

Inasmuch as the petitioner has never advanced a coherent claim that the petitioner qualifies as an alien of exceptional ability or as a member of the professions holding an advanced degree, the petition cannot be approved. Similarly, the petitioner has offered no clear argument in favor of the national interest waiver. The petitioner has not shown that the director erred in denying the petition, and therefore the appeal must be dismissed. It is abundantly clear that the petitioner seeks a benefit that only DOS, rather than CIS, is in a position to grant.

Because the petitioner seeks a classification outside of CIS' jurisdiction, the AAO, in this proceeding, takes no position as to whether or not the petitioner qualifies for classification as a special immigrant as described at section 101(a)(27)(D) of the Act.

ORDER: The appeal is dismissed.